FILE COPY

No. 650 26

Office-Supreme Court, U.S.
FILED
MAR 17 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To The Use
of Others,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN T. CAHILL,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

Of Counsel:
WILLIAM C. CHANLER,
ROBERT G. ZELLER.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 650.

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To The Use
of Others,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

The Court of Claims found without dissent* that Respondent and its creditors (the "use-plaintiffs") had incurred certain expenses** in performance of the terms of the contract involved in this suit. The judgment now sought to be attacked is a judgment for those expenses alone,

---

* The Court's Findings of Fact are set forth in 245 numbered paragraphs printed at pages 86 through 268 of the Appendix to the Petition for a Writ of Certiorari. Although two judges wrote dissenting opinions, no dissent was noted to these Findings.

** Some of these expenses had been paid by Respondent before this suit was brought; most had not. It is the unpaid creditors to whom such expenses were owed who joined as "use-plaintiffs" with Respondent in the suit.

since Respondent did not seek or recover any element of profit.

This contract was *not* a contract born of the desire of Respondent or its Sponsors for Government business. It was a contract initiated by the Government. The origin of the contract has been well stated by Petitioner itself:

> "To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, App., *infra*, pp. 95, 102-103)" (Pet., p. 4).

Not content with a mere request that the Sponsors formulate a proposal which might serve as the basis for negotiating a contract for the purchase of power by the AEC, it was the Government—the Budget Bureau—which took Wenzell on as a part-time consultant without compensation and asked him to stay in touch with the Sponsors as a kind of "expediter", as the Court below found, "to keep their [the Sponsors'] interest alive and to get it into the form of a proposal which the Government could consider" (Pet. App., p. 53).

Wenzell, the alleged double dealer, was not used by the Government at the request of the Sponsors; in fact, they protested his presence and warned that it might prove to be embarrassing (Pet., pp. 18, 21; Findings 68, 78). The Sponsors knew that in the controversy over the general Administration policy in favor of investor-owned power as against Government-owned power, all kinds of fighting—even unfair fighting—would go on. As the Court below accurately stated the matter (Pet. App., pp. 56-57):

> "The sponsors, though they had not employed Wenzell, nor given him any interest in their enter-

prise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' admonition to Hughes [then Assistant Director, and later Director, of the Bureau of the Budget], who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government but adequate to destroy the enemy if it became necessary to resort to such a weapon. There is, it seems to us, something essentially cynical about the Government's Wenzell defense."

Eventually, about eight months after the contract was made, the Government concluded it no longer had any need for the contract. This came about because the City of Memphis decided to generate its own power, thereby eliminating the problem of TVA's need for additional power which the Government had asked the Respondent's Sponsors to come in and solve for it—a problem which they in good faith and with great effort and expenditure of money and time had set about solving. Thus the Government, for its own business reasons, cancelled the contract.

Thereafter, when the political atmosphere became too hot for that same Government which had urged the Sponsors to help—and for the very reasons about which the Sponsors had warned the Government—the Government piously announced that the contract could not be recognized because of conflict of interest resulting from the Government's use of Wenzell.

Counterstatement of Questions Presented.

It is apparent from the foregoing and from the Petitioner's own statement of the facts that Petitioner's statement of the question (Pet., p. 2) is neither fair nor accurate.

From Petitioner's statement of the "Question Presented," one would assume that this was an ordinary case of conflict of interest where an effort is being made to enforce a contract for the benefit of a person who, while acting for the Government in the negotiation of the contract, had a direct or indirect interest in the private contractor which might have tempted him, for his own benefit, to favor the contractor at the expense of the Government. According to Petitioner's statement, the only fact that distinguishes this from the ordinary case is that here the Government had knowledge of its agent's interest. Therefore, Petitioner's statement asserts, the only question presented is whether such knowledge bars the Government from disaffirming the contract.

That could be an interesting question, possibly warranting full consideration by this Court, if a case should arise in which the facts are such that that question is presented. This, however, is not that case, as is shown by the unanimous Findings of the Court below and even by the Petition itself.

Instead the only substantial question presented is: Should this Court lend assistance to the Petitioner's effort further to postpone, at great expense and loss to the Respondent and its creditors, the day when it honors its good faith contractual obligations?

The Court below pointed out that the contract had been made in good faith between Respondent and the Government acting through the Atomic Energy Commission and after hotly contested negotiations; that there was not the slightest suggestion of any "conflict" on the part of those who acted for the Government in the negotiations; that the Respondent performed in good faith until the Government told it to cease performance because the power was no longer needed; and that the Respondent and its unpaid creditors are therefore entitled to compensation for the expenses they thereby incurred. It is likewise clear that no person or corporation alleged to have had a conflict of interest will receive as much as five cents as a result of the judgment sought to be reviewed. On the facts and the law the case is very simple and not one for this Court.

As the Court below stated (Pet. App., p. 57):

> "The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skilful bargaining by representatives of the Government who had complete fidelity to their trust * * *."

The concession made in the Court below is also made here:

> "the final contract turned out to be fair and honest" (Pet., p. 35).

To the extent that there is a legal question involved—certainly not one which merits this Court's attention—it is as follows:

The United States is a party to a contract negotiated for it by the Atomic Energy Commission, as to which the unanimous findings are that it was negotiated in sessions which were lengthy, arduous and hotly contested, that such negotiations lasted from July 7 to November 11, 1954, a period of over four months, and that the representatives of the Atomic Energy Commission who negotiated the contract were competent and aggressive, with no one claiming that they lacked a singleness of purpose in representing the interests of the Government. Over three months before these negotiations began, the Bureau of the Budget, in efforts initiated by the Government, attempted to get the contractor's Sponsors to submit a proposal which could serve as a starting point for negotiations, and in doing so, the Bureau used an unpaid consultant who was an officer and stockholder of an investment banking firm, of which fact the Bureau of the Budget was fully aware. The unpaid consultant had no legal relationship with or interest in the contractor, its Sponsors, or the contract. The unpaid consultant engaged in no act, and had no power, to bind the Government or to make decisions on its behalf; he not only did not participate in the negotiation of the contract but did not even participate in the Government's decision to begin those negotiations. He terminated his consultancy long prior to such decision and negotiations, and this came about as the result of the prompt and effective steps taken by the contractor's Sponsors. Neither he nor the investment banking firm with which he was connected, and which was retained as one of two financial agents after the unpaid consultant had terminated his Government connection, has any interest in this law suit. Under such circumstances may the Government repudiate its obligations under the contract on the ground that the unpaid consultant had an alleged conflict of interest?

Outline of Argument.

As appears from the facts as set forth in the Petition, and as noted by the Court below (Pet. App., p. 56), the most obvious feature of this case is that it contains none of the elements ordinarily found in a conflict of interest situation.

In the first place, neither the Bureau of the Budget nor, *a fortiori* Wenzell, its part-time unpaid consultant, had any responsibility for the negotiation of the contract in question, or ever took any part in such negotiations.

In the second place, Wenzell had no interest in Respondent and no interest in its contract. Wenzell was not an officer, agent, member, employee, or stockholder of Respondent; nor did he have any other legal relationship with Respondent. During the time Wenzell was a Government consultant there was no agreement or understanding, written or oral, formal or informal, contingent or otherwise, with respect to the possibility that First Boston (an independent corporation of which Wenzell was an officer and stockholder) might be retained as a financial consultant by Respondent if a contract between Petitioner's contracting agency (the Atomic Energy Commission) and Respondent should later be made. In other words, even if Petitioner's view be accepted, Wenzell's alleged "interest" could have consisted of no more than a hope that if a contract between the AEC and Respondent should later be made, First Boston might be retained by Respondent to serve as a financial consultant.

In the third place, the Sponsors, as soon as they became aware of the possibility of embarrassment,* not only called

---

* It was apparent that if a contract were entered into and if Respondent decided to retain a financial agent to assist in negotiating a loan from institutional investors, First Boston would be considered for such agency because of its experience in the financing of a previous transaction similar to that under consideration by the Respondent and Petitioner (Findings 27, 68).

the matter to the attention of both the Petitioner and Wenzell's private employer, but also took affirmative steps to obtain his removal from his Government employment.

And finally, the record shows conclusively that as a result of Respondent's efforts, Wenzell was directed to wind up his activities and withdraw as a Government consultant as soon as possible, and he actually did so before the Sponsors had even formulated the proposal which later became the subject matter of negotiation. This all happened three months before negotiation of the contract was commenced, and seven months before the contract was entered into.

One would assume that a mere statement of these facts, all of which are incontrovertibly established by the Findings, would constitute a sufficient answer to any attempt by Petitioner at this time to disaffirm the contract as against Respondent, the contractor. We submit also that an examination of the petition will disclose that Petitioner is fully aware of the significance of these facts, and of the necessity of explaining them away.

For after arguing ineffectually that Wenzell had violated Section 434, Petitioner turns to the problem of using his alleged violation against Respondent. In doing so, Petitioner concedes that the "conflict" could have been effectively "removed" and the "air" cleared of any "taint" if the contractor had taken proper steps to that end. Ignoring the fact that the steps actually taken by the Sponsors resulted in Wenzell's timely removal and in thus effectively "clearing the air", Petitioner blandly asserts that while the means of accomplishing that purpose were "so readily at hand and so simple to apply, [they] were not used" (Pet., p. 39).

Petitioner seeks to support this astonishing proposition by arguing that the only proper course would have been

for the Sponsors "to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction" (Pet., p. 38). Instead of calling the situation to the attention of Wenzell and of both his Government and private employers and thereby procuring his removal, as the Sponsors did, Petitioner insists they should have brought pressure directly on First Boston to force Wenzell's prompt removal, thus avoiding the possibility that his Government superiors would prove to be "complacent, ignorant or negligent officials" (Pet., p. 39).*

Thus, the points really raised by the Petition are first, whether under the uniquely complex facts of this case, Wenzell did violate Section 434; and, secondly, can the Government disaffirm the contract as against Respondent because Respondent, instead of bringing pressure on First Boston, permitted the Government's interests to remain with two of its highest administrative officials—the Director and the Assistant Director of the Bureau of the Budget, reporting directly to the President.

We shall argue that Petitioner's contention on the first point is refuted by the record; and that, on the simple principle of *de minimis*, the second point, which is crucial to Petitioner's case, is not worthy of the serious attention of this Court. We shall also show that no question of importance to the future construction and application of the principles of conflict of interest is raised by this record. Having set forth such argument and showing, we shall stop; for we do not conceive it to be our function in this brief to argue the merits of questions which are purely factual or unimportant.

---

* Incidentally, there is nothing in the Findings or the record which would lend a scintilla of support to any inference that Wenzell's superiors were "complacent, ignorant or negligent".

ARGUMENT.

I.

IT IS CLEAR FROM THE FINDINGS THAT WENZELL WAS NOT "AN OFFICER OR AGENT OF THE UNITED STATES FOR THE TRANSACTION OF BUSINESS" IN CONNECTION WITH THE POWER CONTRACT AND THAT HE DID NOT VIOLATE SECTION 434.

The Petitioner's argument that Wenzell violated Section 434 proceeds as if Wenzell were suing for compensation for his services as a part-time consultant or First Boston for a fee, or as if Wenzell or First Boston were among the use-plaintiffs who would get paid for the work they did if the judgment below was permitted to stand. The Petitioner thus conveniently ignores the fact that neither Wenzell nor First Boston will obtain anything under the judgment below and similarly closes its eyes to the vital question whether Wenzell acted as an officer or agent of the United States for the transaction of business *in connection with the very contract upon which suit was brought and judgment was entered.*

The reason for this is plain. The unanimous Findings establish that Wenzell did not and could not, both from the standpoint of time and function, act in this capacity.

A. It Was Unanimously Found Below that Wenzell Had No Part in the Negotiation of the Contract.

The Bureau of the Budget had no responsibility for and took no part in the negotiation of the contract. That was solely the responsibility of the AEC (Findings 34, 130, 131). The function of the Bureau was to determine, as quickly

as possible, whether the Government's policy of arranging for the supply of power for the AEC by private utility interests rather than by the TVA was sufficiently feasible to justify the Bureau's previous elimination from the budget of the appropriation for the construction of the proposed Fulton Plant by the TVA (Findings 37, 40, 45). It was only in connection with this preliminary exploratory phase that Wenzell acted (Finding 45). Thus, from the very nature of his consultancy, he had no power or authority to conduct any negotiations on behalf of the Government and he did not do so.

The last thing Wenzell did as an unpaid consultant to the Bureau of the Budget was done on April 3, 1954 (Findings 55, 74, 106).

We cannot improve upon the emphatic voice with which the unanimous Findings of the Court below establish that Wenzell had no part in the negotiation of the contract:

"G. *The Negotiation of the Power Contract*

"133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.

"The AEC's team of negotiators was headed by Cook [Deputy General Manager of the AEC] and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

"The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

"From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 10, 1954, the Government insisted on two new contract provisions, and it was doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract.

"134. On August 18 Nichols [General Manager of the AEC] and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

"Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. At the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as 'major concessions from the company' which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

"135. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times, Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

"136. *Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation*" (Pet. App., pp. 159-161).*

It is to be noted that both dissents in the Court below are at war with the unanimous Findings. To illustrate, Mr. Justice Reed mistakenly speaks of Wenzell's "assistance in the negotiation" (Pet. App., p. 76) and Wenzell's continuing "to negotiate for the Government" (Pet. App., p. 80). The fact is that Wenzell did no negotiating because negotiating did not start until July 7, 1954, three months after Wenzell left the Government.

The same comment applies to the dissent by Chief Judge Jones. Indeed, he starts by agreeing with Justice Reed. While he speaks broadly of various matters in which Wenzell participated, the nub of his argument is: "At least we know that he procured and furnished to the Budget Bureau and to the sponsors information on the probable cost of interest on money to be borrowed by the plaintiff" (Pet. App., p. 83). That was long prior to the contract negotiations, and surely is not negotiating or transacting business. The actual cost of money, not the estimate, controlled the contract (Finding 102). Getting the "probable cost" is like getting a weather prediction. The prediction may be that it will be a sunny day, but Providence alone will determine whether the day will be sunny. So here the prediction was that the interest rate on the debt portion of the MVG securities would be 3½%. The money market, when the securities were actually contracted for, resulted in a higher rate.

Thus, Chief Judge Jones adds nothing to the case which requires review in this Court.

---

* Emphasis supplied throughout.

B. It Was Unanimously Found Below that Wenzell Had No Part Even in the Decision that Negotiations Should Be Opened with the Sponsors.

Here again the unanimous Findings of the Court below cannot be improved upon. Again we call the attention of this Court to the fact that the last time Wenzell did anything as an unpaid consultant to the Budget Bureau was on April 3, 1954. The Findings are:

"F. *The Decision to Negotiate a Contract on the Basis of the April 10 Proposal*

"129. Following the submission of the April 10 proposal, Hughes held a conference with Clapp [Chairman of the TVA] and Nichols, together with staff members from TVA, AEC, and the Budget Bureau, at which time it was agreed that TVA and AEC would make a joint analysis of the proposal and that Adams [Chief of the Bureau of Power, Federal Power Commission] would participate for the Budget Bureau. An intensive review and analysis of the proposal was made, and in connection therewith, representatives of the sponsors met with the Government's representatives to discuss aspects of the proposal and furnish additional information when requested.

"On April 24, 1954, Hughes sent the President a memorandum, reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors and that the Bureau be further authorized to instruct TVA and AEC to work out related interagency arrangements.

"On April 28, 1954, Hughes and the AEC received a telegram from a group headed by Von Tresckow, stating

that they proposed to submit a proposal to AEC and that it would be more favorable than any other of which the group had knowledge. The Von Tresckow proposal was received by AEC on May 27, 1954, and was subjected to a review and analysis during the period June 3 to June 5. As a result, no decision was then made by the Government to negotiate a contract with the sponsors on the basis of the April 10 proposal.

"130. On June 14, 1954, a comparative summary analysis of the sponsors' proposal, the Von Tresckow proposal, and estimated TVA costs for the Fulton plant was presented by Hughes and Strauss [Chairman of the AEC] to congressional leaders in conference with the President. At that time, the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors.

"On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract on a basis generally within the terms of the proposal, and instructing TVA and AEC to work out the necessary contractual, operational, and administrative arrangements between the two agencies so that operations under the contract would be carried out in the most economical and efficient manner.

"131. On June 30, 1954, AEC wrote the sponsors in part as follows:

> As Mr. Cook informally advised Mr. Dixon this date, your proposal dated April 10, 1954, offering to furnish 600,000 kw of firm power in the Memphis

area constitutes a satisfactory basis for negotiation of a definitive contract.

We are ready to begin negotiations.

"The sponsors did not know of the defendant's decision until June 30, 1954. *The sponsors' proposal was a firm offer but, as indicated by the quotation above, the AEC letter was not an acceptance; it was simply a statement that AEC was ready to begin contract negotiations*" (Pet. App., pp. 157-159).

C. From What Has Already Been Shown as to What Wenzell Did Not Do, Detailed Analysis of What Wenzell Did Do Is Wholly Immaterial.

This is a suit on a contract. Once it is recognized, as it must be from the lower Court's undisputed Findings, that Wenzell did not act as "an officer or agent of the United States" for the transaction of business *in connection with that contract*, whatever else he may have done is wholly beside the point.

We would like to point out, however, that examination of the unanimous Findings will disclose that Wenzell's activities related almost entirely to a proposal which wound up in the wastebasket nearly four months before the negotiation of the contract began.

This was the proposal of February 25, 1954. On March 24, 1954, the Sponsors were advised that this proposal was unsatisfactory (Finding 93). As the Petition itself recognizes:

"The sponsors *then began to develop a new proposal* which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, App., *infra*, pp. 139, 141, 142). After modifying the proposal in

> the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, App., *infra*, pp. 143, 146)" (Pet., p. 7).

The unanimous Findings show that as early as March 1, Wenzell was pointing out to his superiors in the Bureau of the Budget that his competence was limited; and that on March 9 he stated to the then Director of the Budget Bureau, Dodge, that "he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Findings 74, 85). Adams was substituted for Wenzell by March 23 (Findings 91-92). "Since Adams had been called in by the Bureau to advise it on the cost of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954" (Finding 94). As shown above, it was not until after March 23 that work on the April 10 proposal even began.

It was the proposal of April 10—not the proposal of February 25—which was before the parties when negotiation of the contract began on July 7 (Findings 131, 133).

We will not burden the Court with other reasons, sustained by the Court below, why Wenzell did not violate Section 434. We believe the discussion we have included should be sufficient to satisfy the Court that this case is factual, not legal, and that there are no problems concerning the proper application of Section 434 raised by these facts of sufficient importance either to require or to merit review by this Court.

II.

THE ONLY ISSUE RAISED BY THE PETITIONER OTHER THAN THE ALLEGED VIOLATION OF SECTION 434 IS WHETHER THE SANCTION OF NON-ENFORCEMENT CAN BE INVOKED AGAINST THIS CONTRACT DESPITE THE SUCCESSFUL EFFORTS OF THE CONTRACTOR TO BRING ABOUT WENZELL'S TIMELY REMOVAL, SOLELY ON THE GROUND THAT AN ALLEGEDLY MORE EFFECTIVE METHOD OF OBTAINING HIS REMOVAL WAS AVAILABLE.

After attempting to establish the proposition that Wenzell violated Section 434, the Petitioner turns to the problem of relating the alleged violation to Respondent, and showing why what is called "the sanction of non-enforcement" should be imposed as against it under the circumstances here present.

As we have seen, and as noted by the Court below (Pet. App., p. 56), the factual situation presented by this record is unusual. Normally, the sanction is invoked in order to prevent the person alleged to have had the conflict of interest from recovering any benefits he may have obtained as a result of his activities. Here the petitioner is not seeking to invoke the sanction against Wenzell. He has no interest, direct or indirect, either in the contract itself or in this lawsuit. Neither he nor his employer First Boston has ever received or claimed as much as five cents of compensation, directly or indirectly, either from the Government or from the Respondent, under this contract.

Instead, the Government is attempting to invoke the sanction against those who do have an interest in the contract, the Respondent and its seventeen unpaid creditors who are the use-plaintiffs in this case. Not only did the Sponsors not retain Wenzell or have any legal relationship

with him whatever, but as soon as they became aware of Wenzell's position, they took reasonable and proper steps for the purpose of having him removed from the scene, and succeeded in having him removed from the scene before any "taint" or "conflict" could arise.

One would assume that this state of facts would dispose of any contention that the Government can now repudiate the contract. And this, we submit, is evidently recognized by the Petitioner. For it devotes a considerable portion of its argument to an effort to explain it away. But its effort to do so is so ineffectual, and indeed almost frivolous, as to show that this record raises no issue requiring review by this Court.

This effort consists of the argument that the Sponsors should have but did not take the proper steps to "remove that conflict" (Pet., p. 38). The Sponsors, argues the Petitioner, "had only to inform Wenzell (and First Boston) that First Boston would not be considered as financial agent for the project if he participated in the transaction" (Pet., p. 38). Thus, "the means of clearing the air of the taint were so readily at hand and so simple to apply, but *were not used.* * * * Finally, the sanction of non-enforcement—not unfair to contractors who have reason to know of the conflict-of-interest *but do not take what action they reasonably can*—is an effective and appropriate supplemental remedy against contravention of the Congressional mandate by complacent, ignorant, or negligent officials, [*] as well as by conniving or negligent double-agents. If that remedy exists here, actual and potential contractors will not content them-

---

* Petitioner elsewhere accuses Hughes and Dodge of attempting unlawfully to "waive" Section 434, although there is not the slightest hint either in the Findings or in the record that these two high administration officers did not act throughout with a complete singleness of purpose in furthering the interests of the Government. See Petition, pp. 36, 37.

selves with merely expressing concern over a conflict-of-interest" (Pet., p. 39-40).

In other words, Petitioner, although conceding that if proper steps to "remove the conflict" had been taken by Respondent, the contract would have been enforceable, contends that the "sanction of non-enforcement" must be imposed here because Respondents acted, and correctly, on the basis that the Director and Assistant Director of the Bureau of the Budget, two high-ranking officials of the Government responsible directly to the President, were competent to protect the Government's interests once Respondent had seen to it that the facts were fully disclosed to these officials. Now, says the Petitioner, a contractor in such a situation as this must also, officiously, bring pressure upon the unpaid consultant's private employer so as to deprive the Government of an advisor whom its high officials desire and believe it proper to retain.

As we shall show in the next point, the steps actually taken by Respondent were just as reasonable and appropriate at the time the situation arose as those now suggested, and they proved effective. Far from contenting themselves with "merely expressing concern over a conflict-of-interest" when Wenzell continued to appear at meetings, the Sponsors followed through on their original suggestion that he should be removed by taking the matter up directly with Hughes himself. Moreover, the record shows that Hughes and Dodge, far from "waiving" the statute or "condoning" Wenzell's alleged violation of law, advised him that, although there was no existing conflict at the time, he should wind up his work as quickly as possible and withdraw. And he did so before the termination of the preliminary exploratory discussions.

It becomes important, in view of the Government's reliance on this proposition, to review with some care just

what the Sponsors did, what Hughes and Dodge did, what Wenzell himself did after the possible consequences of Wenzell's position were recognized, and what the results of their actions were. For when these facts as they are incontrovertibly set forth in the unanimous Findings are examined, it will be clear that the determination of whether the Government's newly suggested "solution" would have been substantially better or quicker than the one actually used by the Sponsors presents an issue so clearly within the principle of *de minimis* that it presents no question requiring review by this Court.

III.

IT IS CLEAR FROM THE RECORD THAT THE STEPS TAKEN BY THE SPONSORS TO OBTAIN THE REMOVAL OF WENZELL WERE A MORE PROPER AND EFFECTIVE MEANS OF "CLEARING THE AIR" THAN THE ALTERNATIVE STEPS NOW ADVANCED BY PETITIONER.

Some time in February of 1954, Daniel James, Dixon's counsel, became concerned lest embarrassment might result from Wenzell's position with the Government in the event that a contract should ultimately be agreed upon and First Boston should be selected to assist in obtaining the necessary financing. He discussed the problem with Dixon, and on February 23 Dixon took the matter up with Wenzell, suggesting that "Wenzell discuss the situation with the Bureau of the Budget and his counsel" (Finding 68). On the same day, Wenzell discussed the matter in some detail with Hughes, who "replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore

the question with counsel, and then to talk with Dodge about the matter" (Finding 69).

Thereafter, Wenzell discussed the matter with First Boston and its counsel, and was advised by the latter to resign at once and in writing. Petitioner attempts to make much of the fact that Wenzell did not follow this advice. The validity of this attempt is, to say the least, highly questionable in view of the wholly inchoate state at that time of the possibility of there ever being a contract to be negotiated with Respondent and the fact that Hughes had told Wenzell the matter was being exaggerated, instructed him to discuss it with Dodge, and continued to give him assignments.

In any event, even if Wenzell were at fault in following the advice of Hughes, his immediate Government superior, rather than that of First Boston's counsel, it is difficult to see what bearing that fact would have on the present claim of Respondent. For the record shows that after the initial conversation with Wenzell, James followed up with Dean, First Boston's lawyer, and Dixon followed up with an official of First Boston, from whom he learned "that First Boston's counsel had advised Wenzell to resign his position with the Bureau of the Budget at once" (Finding 78).

The record also shows that while First Boston's president, Coggeshall, assumed that Wenzell would follow counsel's advice, Messrs. Dean and Raben, the counsel in question, followed up by telephoning Wenzell on March 3 and again on March 10. At the time of the latter conversation "from the statement Wenzell made, Raben decided that Wenzell's decision to resign was an accomplished fact and that the resignation would be submitted momentarily. Consequently, Raben took no further action on the matter" (Finding 79).*

* As will be shown, this conversation took place the day after Wenzell agreed with Dodge that he would wind up his affairs and terminate his work as quickly as possible.

Meanwhile, when Dixon and James found that Wenzell was continuing to attend meetings at the Bureau after February 23, they took the matter up with Hughes himself: "Although James had understood that Wenzell was going to resign, he had learned that Wenzell was occasionally taking part in meetings of the Budget Bureau and James wanted to know why Wenzell was continuing to act as a consultant to the Bureau. * * * Hughes made no comment on the matter" (Finding 78).

On March 9 Wenzell called on Dodge and raised with him the problem of Wenzell's continued consultancy to the Bureau, as he had been instructed to do by Hughes. Dodge pointed out to Wenzell that "at that time, there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be expected before the question of financing would arise. However, Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible. Wenzell replied that he would terminate his work in the Bureau soon" (Finding 85).

At the same conference with Dodge "Wenzell stated that he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Finding 85).

That Wenzell did what Dodge told him to do—finish his work with the Bureau as quickly as possible—is established. On that same day, March 9, Wenzell attended a meeting at the Bureau at which an analysis of the Sponsors' proposal of February 25, prepared jointly by the AEC and TVA, was

discussed. Wenzell joined in the general opinion that the estimates of cost were too high and was asked to speak to the Sponsors in order to "determine whether the sponsors would submit a better proposal" (Finding 84). Thereafter, Wenzell attended two more meetings at the Bureau, on March 11 and 16, at which the joint AEC-TVA analysis was further discussed. On the latter date, Wenzell again suggested that Adams be brought in and requested to make an independent analysis of the February 23 proposal (Findings 87, 89).

The meeting of March 16, held one week after Wenzell's conversation with Dodge, really marked the end of Wenzell's active participation as a Budget Bureau consultant. His replacement, Adams, began acting as a technical consultant to the Bureau on March 19, 1954 (Finding 91). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell "'to make sure that he (Wenzell) had turned everything over to Adams'" (Finding 92). The next day, "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (Finding 92).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Findings 94, 97, 98).

Thus, it is evident that as a direct result of the "expressions of concern" by the Sponsors to Wenzell's Government superiors, both Wenzell and his Government superiors took steps to terminate his consultancy as soon as possible without interfering with the turning over of his duties to Adams.

In view of these facts, the unreasonableness of Petitioner's argument that Respondent's salvation is dependent on the Sponsors' also having put pressure on First Boston to get Wenzell out of the Government is almost incredible. Suppose they had done so and that Wenzell had disobeyed Dodge's instructions to wind up his work before getting out. Respondent would in that event, undoubtedly now be charged with having deviously deprived the Government of the services of a valuable consultant, and Wenzell's consistent position that the estimates in the Sponsors' February 25 proposal were too high (Finding 74) would be pointed to as the sordid motive for the Sponsors' desire to be rid of Wenzell.

To suggest, as the Petition does, that the failure of Hughes and Dodge to fire Wenzell forthwith when the matter was first brought to Hughes' attention on February 23 constituted an attempt by them to "waive" Section 434 —which now appears to be an important part of the Government's contention that the "conflict" was not successfully "removed"—is, we submit, manifestly absurd. It was perfectly true at that time, as both Hughes and Dodge pointed out, that the problem was being exaggerated. For there was in fact "no proposal that could be used for a basis of negotiation" before the Government at that time, and there would not be one for some time to come. Dodge and Hughes were perfectly familiar with what Wenzell was doing, and were undoubtedly aware that Wenzell's participation as a consultant to the Bureau during the exploratory discussions as to the feasibility of the project did not constitute any violation of law or any improper activity on his part. What they did was not an attempt to "waive" Section 434. It was a successful attempt to prevent any possibility

of its violation without interfering with the progress of the exploratory discussions.*

The Petitioner intimates that Hughes and Dodge should have consulted the Attorney General (Pet., p. 36). We submit that if all the facts, including the true nature of Wenzell's employment by the Bureau had been submitted to the Attorney General by Hughes on February 23, he would have advised that they take precisely the course that Hughes and Dodge did take: To tell Wenzell to wind up his activities as soon as possible and withdraw before any problem of conflict could arise. The unanimous Findings show this is precisely what happened.

The decision of the Court below, on the facts as found, establishes a very demanding precedent. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of the Government, to prevent the development of any conflict which might conceivably harm the Government in its dealings with private contractors.

---

* The Government also complains that "despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell, dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract" (Pet., p. 39). We would point out that during the period of Wenzell's Government consultancy, these "services" of Wenzell's consisted of his complying with the instruction which Hughes, his Government superior, had given him (Finding 55).

Nor do we see the relevance of the fact that after the termination of Wenzell's Government employment, Respondent retained First Boston as one of its financial agents. On Petitioner's theory, Wenzell's "interest" which vitiates the contract consisted of his alleged hope that First Boston would be retained. This so-called "interest" would have existed even if the Sponsors had decided not to retain First Boston, but instead to obtain the financing themselves. The hope could have existed whether or not it was ever fulfilled.

We submit that this Court should give short shrift to the cynical attempt of the Petitioner to repudiate its obligations under a concededly fair and honest contract (Pet., p. 35) on the alleged ground that, in the light of hindsight, Hughes and Dodge, two of the highest officers of the Government of the United States, responsible directly to the President himself, did not act on the Sponsors' suggestion that they get rid of Wenzell as expeditiously as the Petitioner now, for the purpose of avoiding its honest debts, contends they should have done.

Section 434 was enacted to prevent the Government from being cheated, not to enable the Government to cheat honest citizens. The public interest will not be served by permitting it to be perverted for such a purpose.

Conclusion.

The Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent.

Of Counsel:

WILLIAM C. CHANLER
ROBERT G. ZELLER

Dated: March 16, 1960